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80-276

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners

VS.

CHRISTINE VAUGHN and MARION GEE,

Respondents

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**for the Eighth Circuit**

JAMES W. MOORE
Twentieth Floor
First National Building
Little Rock, Arkansas 72201

WALTER A. PAULSON
Attorneys for Petitioner

## QUESTION PRESENTED

(1) Whether an employer, in order to rebut a prima facie case of disparate discriminatory treatment under Title VII of the Civil Rights Act of 1964, must support its articulated nondiscriminatory reasons for its employment action with objective evidence.

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To the United States Court of Appeals
for the Eighth Circuit

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The Petitioner Westinghouse Electric Corporation respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 23, 1980.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, appears in Appendix B, pages B-1 to B-___, and is reported at 620 F.2d 655 (8th Cir. 1980). The opinion of the United States District Court for the Eastern District of Arkansas, Richard Sheppard Arnold, J., appears in Appendix A, pages A-1 to A-__, and is reported at 471 F.Supp. 281 (E.D. Ark. 1979). The order of May 23, 1979 appears in Appendix A, page A-__.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 23, 1980. A timely petition for rehearing en banc or by the panel was denied on May 23, 1980, and this petition was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

(1) Whether an employer, in order to rebut a prima facie case of disparate discrimina-

tory treatment under Title VII of the Civil Rights Act of 1964, must support its articulated nondiscriminatory reasons for its employment action with objective evidence.

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§2000e-2. Unlawful employment practices -- Employer practices

(a) It shall be unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## STATEMENT OF CASE

This dispute arose when the Plaintiff below, Ms. Christine Vaughn, a black female employee, filed suit alleging inter alia, that she was disqualified as a sealex machine operator by defendant Westinghouse Corporation in 1971 because of her race in violation of Title VII, 42 U.S.C. §2000e-2. At the conclusion of trial to the court, the district court found against two other plaintiffs on their claims and found against Vaughn on all other claims except the single claim regarding her disqualification as a sealex machine operator. Ms. Vaughn, a black, was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor grade 4, at $2.20 per hour. She was transferred on November 16, 1970 to the second shift, and on January 25, 1971, to the third shift due to a reduction in force. She continued in that position on the third shift under the supervision of Mr. C. T. Turnage until April 19, 1971, when she was disqualified as a sealex operator by Mr. Turnage and

placed on an open labor grade 1 job, resulting in a loss of pay of $ .24 per hour. She has remained since that time in the employ of Westinghouse and at the time of trial had attained the rate of labor grade 3 at $5.40 per hour.

At the time Ms. Vaughn was transferred from sealex operator on the second shift, her shift supervisor evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position.

On the third shift, under Mr. Turnage's supervision, Ms. Vaughn was verbally warned on five separate occasions that her production was unacceptable due to an inadequate number of lamps sealed and too many burnt wires. These verbal warnings were noted in writing by Mr. Turnage, and his notes were made a part of the trial record. On April 19, 1971, Ms. Vaughn was disqualified from her job as sealex operator. The disqualification form noted that she could not hold this job in the future and stated that although she got along well with others and

had good attendance, the supervisor was unable to motivate her and she showed no interest in the job as sealex machine operator.

The district court held that the plaintiffs had established a prima facie case of racial discrimination under the rationale of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Vaughn v. Westinghouse Electric Corp., 471 F.Supp. 281, 286 (E.D. Ark. 1979). That finding was based primarily upon a finding of low black representation in non-production jobs, an apparent but unexplained adverse impact upon black applicants in the Defendant's hiring decisions, and the proof that Ms. Vaughn had held the position, was disqualified and a white employee replaced her. Ibid. The district court then held, with respect only to Ms. Vaughn's disqualification, that Westinghouse had failed to demonstrate proof sufficient to overcome Plaintiffs' prima facie case. Vaughn, supra, at 289-90.

From the district court's final

judgment on June 13, 1979, Westinghouse filed a timely Notice of Appeal to the Court of Appeals for the Eighth Circuit on July 3, 1979. On appeal, Westinghouse argued that, assuming that Plaintiffs had demonstrated a prima facie case, the district court applied an incorrect standard to Defendant's burden in rebuttal of that prima facie case. The Court of Appeals held that the district court had properly concluded that the Defendant had not met its burden of showing by a preponderance of the evidence that a legitimate reason for the disqualification existed factually which was sufficient to overcome the Plaintiffs' prima facie case. Vaughn v. Westinghouse Electric Corp., 620 F.2d 655, 659 (8th Cir. 1980). Defendant's petition for rehearing en banc was denied on May 23, 1980.

## REASONS FOR GRANTING THE WRIT

I. The Decision Below Has Resolved an Important Question of Federal Law in a Manner Which Conflicts With and Miscon-

strues This Court's Recent Holdings In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) and Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

This Court has held that once the plaintiff in a disparate treatment case under Title VII of the Civil Rights Act of 1964 had established a prima facie case, the employer, in order to dispel the adverse inference of that showing, need only "articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). More recently, the Court has had occasion to reaffirm that holding, describing the employer's burden as "merely that of proving that he based his employment decision on a legitimate consideration, not an illegitimate one such as race." Furnco, supra, 438 U.S. at 577-78. In Furnco, the "legitimate consideration" upon which the employer had based his decison not to hire the plaintiffs was the importance of selecting people whose capability had been demon-

strated to defendant's brick superintendent. 438 U.S. at 574. The criterion for selection was the superintendent's evaluation of the applicant's competence, based upon the superintendent's own prior observance of their work, or upon recommendations made by a general foreman, a particular black employee or defendant's General Manager. 438 U.S. at 572. This Court specifically cautioned against "embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the 'best' hiring procedures." The Court then noted that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." Yet a restructuring of Westinghouse's entire system for employee evaluation is precisely what is required by the Court of Appeals in the instant case, since without such a change it would be impossible for the employer to show that his decision was

"legitimate." If the rule espoused by the Court of Appeals in Vaughn had been applied in Furnco, the result would have been to require the superintendent to produce in support of his decision records from previous construction jobs showing the number of bricks laid per hour by each rejected applicant, compared to additional records as to each selected applicant, and compared to an industry standard for brick-laying reflecting similar objective measurements. The Petitioner asserts that no such showing was required or intended by the Court in Furnco, and further submits that requiring such a level of proof substitutes the district court's judgment for that of the employer on an important business matter. This the courts are simply not competent to do.

In Board of Trustees v. Sweeney, supra, this Court further refined the intent of its holdings in McDonnell Douglas and Furnco. Faced with a First Circuit opinion which required the employer to prove the absence of a discriminatory motive the Court

vacated the decision and remanded, relying on Furnco to hold that the employer need not prove absence of discriminatory motive in order to meet the rebuttal requirement of Furnco. The First Circuit opinion is instructive on this issue, for there the Court, after reviewing the many decisions resulting in defense verdicts in sex discrimination cases, states:

> "However, we voice misgivings over one theme recurrent in those opinions: the notion the courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress."

The unabashed attempt by the Court of Appeals to reverse a clear trend in the case law met with a firm but foreseeable result. In order to circumvent its clear lack of expertise in evaluating performance

in the workplace, the Court of Appeals was forced to "gloss" onto the employer's burden in McDonnell Douglas an additional requirement. The Supreme Court stated unequivocally that no such gloss would be permitted. 439 U.S. at 25. Petitioner would assert that the instant case is but another ill-considered attempt to avoid a result which the decisions of this Court clearly require. While the Eighth Circuit in Vaughn has gone to great lengths to harmonize the language of the district court with that of Sweeney, it has failed to avoid the same pitfall as the First Circuit. It may not, in order to achieve a desirable result, add requirements to the established tests set out by this Court.

II. The Decision Below Conflicts With the Decisions of Other Courts of Appeals As To the Employer's Burden of Proof in Rebutting a Prima Facie Case Under Title VII.

The Eighth Circuit in Vaughn has required that the defendant, in order to rebut a prima facie csae made pursuant to

McDonnell Douglas, supra, "prove the legitimacy of its articulated reason by a preponderance of the evidence." Vaughn, supra, 620 F.2d at 659. While that statement in the abstract may be consistent with Furnco and Sweeney, the resulting proof requirement is not. Vaughn's requirement of objective criteria asks the defendant to accomplish the illogical task of rebutting pretextual evidence before it is even offered by the plaintiff.

The First Circuit has held that in light of Sweeney, (which reversed that very circuit), a trial court's instruction that required the defendants "to prove by a preponderance that their actions were motivated by reasonable factors other than age or were for good cause" was error, because it placed too great a burden on defendants. Loeb v. Textron, Inc., 600 F.2d 1003, 1011 (1st Cir. 1979). This instruction, held to be violative of Sweeney by the First Circuit, is very similar to the language of the Eighth Circuit quoted supra. The First Circuit went on to discuss the "[c]onfusion

as to defendant's burden" created by this Court in Furnco, when it used the term "proving" to described the rebuttal burden. Id. at 1012, citing Furnco at 577. Clearly, as the Court of Appeals decided, all the use of the term "proving" meant was that the defendant must offer evidence, either through witnesses or documents, which explains what he has done. He is not required to prove by a preponderance, or more restrictively, by "objective criteria," that his action was "legitimate", because that method assumes that the action was a mere pretext without the plaintiff having offered any pretextual evidence.

The Fifth Circuit has apparently adopted the more stringent test applied by the Eighth Circuit in Vaughn. This is evidenced by that Court's requirement that the defendant prove nondiscriminatory reasons for his actions by a preponderance of the evidence. Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980). That case cites Burdine v. Texas Dept. of Community Affairs, 609 F.2d 563

(5th Cir. 1979) cert granted, 48 U.S.L.W. 3820 (U.S. Sup. Ct. June 17, 1980) (No. 79-1764), as outlining the proper test: "[A]rticulating a legitimate reason involves more than merely stating fictitious reasons; legally sufficient proof is needed before the trier of fact can find plaintiff's proof rebutted." Id. at 567. (citations omitted). Although this reasoning accepts the obvious -- i.e. a defendant cannot perjure himself to satisfy the test -- it is the next few sentences in that opinion which show the true meaning of what that Circuit means by "legally sufficient proof". For the Court goes on to require the defendants to show that those hired "were somehow better qualified than was plaintiff." Id. at 567. The Fifth Circuit thus would have the defendant rebut the pretextual case during his rebuttal of the prima facie case -- before pretext has even been raised -- and would require objective production records to do so. Id.

Although the above discussion ade-

quately illustrates the conflict which has arisen among the circuits, the following cases are cited as instructive: Silberhorn v. General Iron Works Co., 584 F.2d 970, 971 (10th Cir. 1978) ("legitimate reason" for discharge was conduct which injured co-worker); accord, Kentroti v. Frontier Airlines, Inc., 585 F.2d 967, 969 (10th Cir. 1978), James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979); Patterson v. American Tobacco Co., 586 F.2d 300, 309 (4th Cir. 1978) (majority doesn't reach issue, but dissent, Widner, J., cautions against over-reliance on objective criteria, citing Furnco for the proposition that courts are not competent to choose the applicable criteria.); Taylor v. Philips Industries, Inc., 593 F.2d 783, 786 (7th Cir. 1979) (Court accepted reasons offered to rebut prima facie case, but held that plaintiff had shown pretext); Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 192-94 (3d Cir. 1979) (Court allowed the employer to rely on supervisor's judgment indiscerning

the most productive employees during a layoff -- predominately a subjective evaluation, similar to those held unacceptable in Vaughn -- and concluded "that the supervisor exercised his best judgment without allowing plaintiff's race to affect his decision." Id. at 194).

III. The Decision Below Conflicts With Other Decisions on The Same Issue Within the Eighth Circuit.

While there are several recent cases within the Eighth Circuit which address the issue, a comparison between Vaughn and another case -- argued a mere six days before the decision in Vaughn -- will illustrate the problem which the District Courts of this Circuit now face. As has been shown above, the Court of Appeals in Vaughn, based in large part upon the absence of objective production criteria, (620 F.2d at 600) held that the employer must prove the legitimacy of its articulated reason by a preponderance of the evidence. Id. at 659. The same Court,

albeit a different panel, found that the employer need not even "show" it had valid reasons, but rather held that the standard required by McDonnell Douglas "is a less burdensome one of articulating some legitimate, nondiscriminatory reason, which does not require proof of the absence of a discriminatory motive." Coleman v. Missouri Pacific Railroad Co., 622 F.2d 408, 410 n. 4 (8th Cir. 1980) (citing Furnco and Sweeney, supra.) The "showing" by the employer was predominately made through testimony by three railroad employees who merely stated their reasons for the decision to terminate the plaintiff. Because the plaintiff apparently failed to show that the reasons were a pretext, the district court's finding of no discrimination was upheld. Coleman, supra at 410. That decision is clearly inconsistent with the resolution of the same issue in Vaughn.

IV. The Decision Below Returns to a Reliance Upon Objective Criteria which was

Disapproved By This Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973).

By requiring objective standards' evidence to support the employer's reason for the plaintiff's disqualification, the Court of Appeals appears to be returning to the almost identical position taken by the Eighth Circuit in McDonnell Douglas, 463 F.2d at 352, which resulted in a reversal and remand by the Supreme Court, 411 U.S. 792, 803:

> "The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a 'subjective' rather than objective criterion which "carr(ies) little weight in rebutting charges of discrimination,' 463 F.2d, at 352. This was among the statements which caused the dissenting judge to read the opinion as taking 'the position that such unlawful acts as Green committed against McDonnell would not legally entitled McDonnell to refuse to hire him, even though no racial motivation was involved. . . .' Id., at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled."

In McDonnell Douglas, supra, the employer refused to rehire the plaintiff, a black male, because of his participation in a "stall-in" designed to tie up access to and from the plant during a peak traffic period. The Supreme Court held, supra, at 804:

> "Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by §703(a)(1). On remand, resondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitoner's stated reason for resondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."

Likewise, Judge Heaney who was on the

Vaughn panel and wrote the Eighth Circuit's opinion in Middleton v. Remington Arms Co. Inc., 594 F.2d 1210, 1212-1213 (8th Cir. 1979), held in Middleton that when an employee raises a claim of disparate discriminatory job treatment, it is incumbent upon the plaintiff, not the defendant, to present evidence that he was treated differently than white employees under similar circumstances. If he could not, his discriminatory treatment claim must fail. In Vaughn, neither the District Court nor the Court of Appeals pointed to any evidence of disparate treatment of the plaintiff. In fact, all her other claims of discrimination were dismissed by the District Court, and no appeal was taken from these findings (Dissent, Gibson, J., 620 F.2d at 661). the only evidence of disparate treatment cited by the District Court and affirmed with approval by the Eighth Circuit dealt with general statistics, testimony of the parties, and testimony of a former plant worker who was not a party concerning persons other than

the plaintiff. (620 F.2d at 658). Furthermore, there was not even any credited evidence of disparate treatment of the plaintiff on the disqualification issue in question -- that is, there was no evidence that the defendant tolerated white sealex operators to perform as inadequately as the plaintiff while not taking similar disqualification or disciplinary action against them from which the Court could draw the necessary disparate treatment inference. It was undisputed that the plaintiff's supervisor had only disqualified or failed to qualify three employees during his term as a supervisor of whom only one, the plaintiff, was a minority.

Petitioner asserts that when Judge Heaney said in Middleton that the plaintiff's claim must fail because he presented "'not one scintilla of evidence' that he was treated any differently than any other employees," he did not mean that this disparate treatment burden of the plaintiff could be borne in subsequent

cases by showing that employees other than the plaintiff were disparately treated under dissimilar circumstances.

The Eighth Circuit in the instant case also has not followed tne dictates of McDonnell Douglas in that there was no evidence of pretext required of the plaintiff to show that her job disqualification constituted disparate treatment. The Vaughn court rejected the documented testimony of Westinghouse's supervisor that the plaintiff's poor comparative quantity and quality of production over a thirty day period of observation prior to her disqualification was a legitimate non-discriminatory reason for her demotion because Westinghouse had no objective production criteria, i.e., production standards, by which to measure her actual performance. Not only did the Supreme Court in McDonnell Douglas rule out the necessity for an objective criterion versus a subjective one, but it also required on remand that the plaintiff carry the burden of showing that his employer's action in

rejecting him for rehire was disparate treatment when compared with its consideration of white employees involved in acts of misconduct of similar seriousness. It therefore placed the burden on the plaintiff, not the defendant as in Vaughn and Burdine, supra. Consequently, since the Vaughn Court improperly rejected Westinghouse's articulated non-discriminatory reason for the job disqualification because it was not based on objective criteria, it never even reached the third stage of the process which requires proof of pretext or disparate treatment by the employee (620 F.2d at 660). The Court indicated, however, that had the District Court reached this stage of the proof, McDonnell Douglas would have approved statistical evidence and testimony of the plaintiff and others relating to instances of discrimination directed other than toward the plaintiff to establish pretext for the plaintiff's own job disqualification. (Id. at 660 f.n. 4) (This indication was given, even though the

District Court had rejected all of the plaintiff Vaughn's other claims of personal discrimination.) The Supreme Court has approved the use of such extraneous evidence as relevant for this purpose, but the Court emphasized that disparate treatment evidence surrounding the individual employee and others like him in similar circumstances was "especially relevant". 411 U.S. at 804. An examination of the evidence surrounding plaintiff's disqualification and others like her by her supervisor established beyond dispute that the plaintiff was not disparately treated by virtue of her job disqualification on April 19, 1971.

Westinghouse produces household light bulbs at its Little Rock plant where the instant charges arose. In one day's production a sealex operator such as the plaintiff would on an average handle 9,450 light bulbs per shift while all sealex operators for all three shifts would handle approximately 330,750 light bulbs per day. As pointed out by the dissenting opinion,

it is obvious that "the paperwork involved in developing and maintaining objective production standards" for the sealex operator as well as the other operations in this one plant would be "titanic". 660 F.2d at 662. Westinghouse does not feel that the Court of Appeals nor the District Court below has fully appreciated the magnitude and adverse impact on productivity and additional cost that the implementation of such procedures would involve. Perhaps, as the dissent suggests, it would result in government supervision of each and every stage of the production process. Perhaps it would contribute to the lowering productivity in this country. 620 F.2d at 662. Clearly, the requirement will result in employers' being unable to rebut a prima facie case of discrimination in virtually every circumstance wherein the prima facie case is made out. If mere logic will not suffice, the doctrine of business justification should at least relieve Westinghouse of the burden of implementing the expensive and time consuming objective production stan-

dards required of it by the Vaughn decision in order to avoid future Title VII liability in job disqualification actions. c.f. United States v. N. L. Industries, 479 F.2d 354 (8th Cir. 1973).

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eight Circuit.

Respectfully submitted,

JAMES W. MOORE
2000 First National Building
Little Rock, Arkansas 72201

WALTER A. PAULSON

# APPENDIX A

Christine VAUGHN and Marion Gee, Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORP., International Brotherhood of Electrical Workers, AFL-CIO Local 436, and International Brotherhood of Electrical Workers, Defendants.

Glenda CRUTCHER, Plaintiff,

v.

WESTINGHOUSE ELECTRIC CORP., Defendant.

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Nos. LR-74-C-215
LR-76-C-196.

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United States District Court,
E. D. Arkansas, W. D.

May 9, 1979

Supplemental Opinion June 12, 1979.

ARNOLD, District Judge

This is a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., to redress alleged discrimination in employment on the ground of race. The two captioned cases have been consolidated. At a pretrial hearing, the motion of defendants to deny class certification was granted, and the case went to trial as three individual claims. Two of the plaintiffs, Marion Gee and Glenda Crutcher, are former employees of Westinghouse Electric Corporation. The other plaintiff, Christine Vaughn, is still employed by the defendant Westinghouse. The claims against the defendant labor organizations were settled before trial, and a consent decree has been entered embodying this settlement. The case was tried to the Court on April 24, 25, 26, 27 and 30, 1979. All parties have rested, and the case is now ready for decision.

[1] Plaintiffs present a variety of claims of disparate treatment by their employer. The nature and order of proof in

this kind of case are set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 36 L.Ed.2d 668 (1973). There, the Supreme Court held that the plaintiff must carry the initial burden of establishing a prima facie case of racial discrimination. In McDonnell Douglas, a failure-to-rehire case, the Court specified the following method of establishing such a case:

> This may be done by showing (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection; the position remained open and the employer continued to seek applicants for persons of complainant's qualfications. (Footnote omitted.) 411 U.S. at 802, 93 S.Ct. at 1824.

Here, no plaintiff claims that the employer discriminatorily failed to hire her. Each of these plaintiffs was at some point employed by Westinghouse. Instead, plaintiff Crutcher claims an unlawful discharge, and plaintiffs Vaughn and Gee claim that they were unlawfully disqualified from cer-

tain jobs they had been holding and made to take other, less desirable jobs. The Supreme Court has made clear that the McDonnell Douglas formulation should not be applied woodenly to every situation. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 801 n.13, 93 S.Ct. at 1824. In the present situation, the McDonnell Douglas test, mutatis mutandis, requires plaintiffs, in order to establish a prima facie case of racial discrimination, to show that they belong to a racial minority, that they were employed by the defendant in a certain capacity, having been initially found to be qualified in that capacity, that they were discharged or disqualified from their jobs, and that following their discharge or disqualification defendant continued to seek and employ persons for the jobs in question. In addition, they have the burden of showing, either by sta-

tistical evidence or by testimony of specific racially motivated incidents, that there is probable case to believe that their discharge or disqualification was motivated in substantial part by race.

[2] This Court finds that the proof is more than sufficient to establish a prima facie case. Title VII of the Civil Rights Act of 1964 became effective on July 2, 1965. At that time almost no blacks were employed by the defendant Westinghouse. there was one black white-collar employee, a secretary. No blacks were in supervisory positions and only one black had been hired (in 1963) as a production employee. The situation has changed rather slowly. Out of 22 office and clerical employees, only three are black at the present time, none of them in a supervisory position. No black person has ever been employed as a supervisor in the defendant's office force at its Lamp Operations Division plant in Little Rock, the plant involved in this case. Out of 25 or 26 supervisors, including manufacturing supervisors, who hold the entry-level management jobs, only

two are now black. One of these has been a supervisor only a year and a half. There is no regular program for allowing production employees to rise to supervisory ranks. When supervisory positions become open, this fact is not systematically publicized, and these jobs are not posted. The only jobs posted are production or "bargaining unit" jobs. The defendant's overall work force is roughly representative of the proportion of blacks and whites in the relevant population, but black employees are heavily, indeed almost exclusively, concentrated in production jobs, which are lower paying. In addition, many more black people than white people apply for jobs at Westinghouse. The following statistical table is illuminating:

| Year | Black Applicants | Black Persons Hired | White Applicants | White Persons Hired |
|---|---|---|---|---|
| 1970 | 175 | 56 | 303 | 118 |
| 1971 | 341 | 17 | 434 | 78 |
| 1972 | 1902 | 96 | 1124 | 149 |
| 1973 | 2209 | 90 | 1104 | 212 |

[3,4] W. T. Hunnicutt, Personnel Manager for the Little Rock plant, testified that he did not know how to explain these figures, and the Court must agree. The inference is very strong indeed that the number of black people hired is being artificially depressed. No particular qualifications are required for production-level jobs at this plant. There is no reason whatever to suppose, to take 1972 as an example, that 149 whites out of 1124 would be qualified, while only 96 blacks out of 1902, a much larger applicant pool, could make the grade. If objective criteria had been or could be prescribed for these jobs, the situation would be different, but apparently persons are hired simply because the employer wants them. Up until 1965 substantially all the employees were white, and perhaps the employer believes that harmony in its work force can best be preserved by not allowing the number of black employees to exceed by much their proportion in the general population, about 18 or 20%. This motivation is forbidden by law. The law requires not that

black people be employed proportionately, but that each applicant, regardless of race, receive equal opportunity. The Supreme Court's pronouncement in Furnco Constr. Corp. V. Waters, 438 U.S. 567, 579, 98 S.Ct. 2943, 2951, 57 L.Ed.2d 957, 969 (1978), is unmistakable:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce. (Emphasis in original.)

[5] In addition, on February 1, 1974, an organizational chart of management positions at the Little Rock plant only listed one black person out of 31. This organizational lineup is still basically the same, except that there are now two blacks out of 31. both of these employees, however, are first-line manufacturing supervisors, or foremen. The same sort of statistical proof is apparent in hiring figures for maintenance jobs. In 1970, no blacks were hired out of 15. In 1973, no blacks were

hired out of 31. And in the years 1970 through 1974, only seven blacks were hired out of 93. Between 1972 and 1978, a total of 65 persons were discharged, 39 of whom were black, a figure far above the overall proportion of black employees, which now is at a high of about 24 or 25%. Possibly this over-representation of blacks in the discharge population is simply a result of chance, and the Court is not holding that any of these particular discharges was illegal. The discharge figures, however, simply add to the impresson that there cannot be so much smoke without at least some fire. With the exception of some maintenance jobs, moreover, no specific qualifications have been set out by the employer either for production-line jobs, as noted above, or for supervisory jobs. Subjective criteria for employment are not illegal in themselves, but the fct that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.

The evidence making a prima facie case goes beyond statistics. Laying to one side

for the time being the testimony of the parties themselves, the Court was especially impressed by the evidence given by Wilma Donley, a former employee. Ms. Donley was employed at Westinghouse from August 31, 1972, through August 28, 1978. She was a bright and diligent worker, though she had some difficulties with absenteeism and lateness. From February 1973 to December 1974 she was a shop steward for the union, International Brotherhood of Electrical Workers, AFL-CIO, Local 1136. In this capacity she witnessed harassment by supervisors of several black employees. She prepared and processed grievances for them. There was a good deal of conflict between foremen and black employees, including bickering and weeping. After January 9, 1975, when Ms. Donley's twins wre born, she was no longer formally a shop steward, but she did continue in an informal capacity to help employees who felt aggrieved, all of whom were black. Ms. Donley observed black employees being given work that rightfully belonged to others, and white employees being permitted

to loaf in the bathroom. Substantially more grievances originated with black employees than with whites and on one occasion Ms. Donley took a group of black employees to an attorney to complain. None of these employees is still with the company. It is not claimed, and the Court does not find, that any of these persons was discharged for consulting an attorney. The visit to the lawyer, and the fact that none of these persons is still at Westinghouse, are simply two more bits of the mosaic that the Court must piece together. Ms. Donley continued to be a spokesman for black employees and was treated as such by foremen. She was finally discharged in 1978 after being absent for reasons of health for some time. Ms. Donley is not a party and did not specifically claim on the witness stand that her discharge was retaliatory in nature, so it is unnecessary for the Court to comment on that question.

Ms. Donley's testimony was wide-ranging, and the above is simply a general

summary. Much of what she said was contradicted by company witnesses, but in view of her record as a competent worker and of the absence of any substantial motive for falsificatoin, this Court specifically credits Ms. Donley's testimony. On the basis of this evidence, together with the statistics recounted above, the Court holds that the plaintiffs have made out a prima facie case of racial discrimination.

[6] Under McDonnell Douglas, the burden then shifts to the defendant to show that the personnel actions taken were based upon some legitimate, nondiscriminatory reason. This issue of course implicates the defendant's personnel actions with respect to the individual plaintiffs, and each of the plaintiffs will be discussed in turn.

1. Glenda Crutcher.

Ms. Crutcher was employed on May 1, 1972, as a sealex machine operator, labor grade 4, on the second shift at the rate of $2.48 per hour. She was "hired in" by

supervisor C. T. Turnage, but was almost immediately transferred to supervisor Roger Maynard. On June 4, 1973, Ms. Crutcher transferred at her request to the labor grade 3 job of mount inspector-coil feeder at the rate of $2.92 per hour. On May 27, 1974, she was transferred as a result of a reduction in force to the labor grade 1 job of flimsie paster at the rate of $3.06 per hour. Her supervisor then became Carl Menyhart. On September 9, 1974, she transferred at her request to the labor grade 1 job of repacker at the rate of $3.22 per hour. On January 16, 1975, she was transferred as a result of a reduction in force to the labor grade 3 job of mount inspector-coil feeder at the rate of $3.68 per hour. Her supervisor became James Birch. On September 22, 1975, she transferred at her request to the labor grade 1 job of getter application operator on the first shift at the rate of $3.52 per hour. Her supervisor became D. J. Batholomew.

On October 3, 1975, Ms. Crutcher was given a three-day disciplinary suspension.

The reasons stated were insubordination and belligerence towards her supervisor. She was given a written warning that future offenses would result in termination. On November 19, 1975 she was terminated, and the reasons given were continued insubordination and use of abusive language.

[7] Ms. Crutcher's specific claims were that she was refused adequate training or help when temporarily transferred to the job of bulb washer, that she was verbally abused and harassed by her supervisors, that she was given a disciplinary suspension for three days, and that she was terminated, all on account of her race and without just cause. Taking into account both Ms. Crutcher's testimony and that of her supervisor's, but relying especially on the copious documentary evidence supplied by the defendant, see International Bh'd of Teamsters v. United States, 431 U.S. 324, 360 n.45, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), this Court is persuaded that the defendant has met its burden with respect to each of these

issues. Ms. Crutcher was in fact given sufficient training, though most of the training came not from the supervisors personally, but instead from other employees assigned for the purpose. Whether training is done by the supervisor or by another employee, and whether the employee giving the training is white or black, are both immaterial. The fact is that training was given, and there is no occasion to determine whether any lack of training might have been due to the employee's race.

The job of bulb washer, which Ms. Crutcher was temporarily assigned to perform, apparently was a particular bone of contention. Her regular job at the time was getter applicator, also referred to by the parties as getter girl. "Getter" is a liquid appled to light-bulb filaments to prevent them from burning to quickly or unevenly. It frequently occurred in the course of the production process that there was no more need for getter to be applied and when Ms. Crutcher assumed the position

of getter applicator this fact was carefully explained to her. She was told at the time that it would be necessary to assign her temporarily to certain other jobs, including that of bulb washer. The Court visited the Westinghouse plant and observed in particular the bulb-washing machine. The machine consists essentially of a series of racks, each of them capable of holding four bulbs. The machine moves at eight-second intervals, during each of which one employee, standing on one side of the machine, must place into the rack four bulbs. Another employee, standing on the other side of the machine, removes the bulbs from the rack after they have passed through a washer. The Court stood and observed this machine for some time. On the occason of the Court's visit the machine was moving at exactly the same speed as in 1975, when the conflict arose between Ms. Crutcher and her employer. The job is of no particular difficulty and should have required little, if any, training. It does require some manual dexterity and attention, as well as diligence

in circumstances that must inevitably be tedious, but the job can in no way be described as complex or exacting. (As a matter of fact, Ms. Donley testified that none of the jobs at the plant was difficult, and that all of them could be properly performed if a person diligently applied herself.) The Court believes that Ms. Crutcher was capable of performing this job and failed to do so because she did not like it.

Various altercations between Ms. Crutcher and some of her supervisors ensued. The testimony as to who said what to whom is sharply conflicting. The matter began to come to a head after Ms. Crutcher became a getter applicator under supervisor D. J. Bartholomew. As noted above, part of her duties was to work on the bulb-washer when there was no need to be applying any getter. On September 29, 1975, Ms. Crutcher went reluctantly to the job. Her performance did not improve. She told Mr. Bartholomew it would not improve because bulb-washing was not her regular job. On

September 30, 1975, she told Mr. Bartholomew that the getter job was hers and that bulb-washing was not. She threw her gloves against the window and refused to clock out when instructed to do so. Mr. Bartholomew recommended that she be discharged, but the matter was resolved with a three-day disciplinary suspension, including a written warning that the next offense would result in termination. On November 3, 1975, Mr. Bartholomew saw Ms. Crutcher at her post reading a book. It was a violation of posted company rules to have personal reading matter in the plant. Upon being admonished, Ms. Crutcher replied in obscene terms. She also told him that his only duty was to see that she got her paycheck. She referred to Mr. Bartholomew and to Richard Thompson, his superior, with a racial epithet. On November 19, 1975, she was discharged.

[8] The Court finds that this discharge was legitimate and nondiscriminatory. Ms. Crutcher's supervisors did not abuse or harass her verbally --

quite the contrary. The company legitimately felt that her work and attitude were unsatisfactory. The fact that the company may have discriminated generally is not an automatic shield for every black employee who claims unfair treatment. An employee still owes his employer a day's work for a day's pay, and it is the duty of the employee to follow proper instructions. This Ms. Crutcher failed to do. Under McDonnell Douglas she could still prevail by showing that the reasons given for her discharge were merely pretextual, a cloak for racial motivation. There is no persuasive evidence in this record to that effect.

2. Marion Gee.

Plaintiff Marion Gee was hired by Westinghouse on June 8, 1970, in the labor grade 4 job of sealex machine operator at the rate of $2.20 per hour. On October 19, 1970, she was disqualified as a sealex operator and placed on the open labor grade 1 job of blub-loader-hand at the rate of $2.55 per hour. On November 1, 1971, she

changed from second to third shift at the request of the company and was then making $2.45 per hour. On January 22, 1973, she transferred at her request to the labor grade 3 job of mount inspector-coil feeder on the second shift at the rate of $2.76 per hour. On April 2, 1973, employee Gee was disqualified as a mount inspector-coil feeder and returned to her former job of bulb-loader-hand at her former rate of $2.76 per hour. On February 11, 1974, employee Gee transferred at her request to the labor grade 3 job of packaging operator-sleeving at the rate of $3.06 per hour. She remained in this job on the second shift until the date of her termination on February 14, 1975, for possession of a loaded firearm on company premises in violation of company rules. At the time of her termination, she was paid at the rate of $3.52 per hour.

[9] Ms. Gee does not contest the legality of her termination. She does claim that she was disqualified from certain jobs, and verbally abused and harassed by

supervisors, on account of race. The two disqualifications at issue occurred on October 19, 1970 (sealex operator), and on April 2, 1973 (mount inspector-coil feeder).

Roger Maynard ws the supervisor who disqualified Ms. Gee on both occasions. She was a sealex operator under his supervisor for about a month in 1970. He testified that her work was characterized by too much "shrinkage," that is, waste caused by burned wires. After a month on the job, according to Mr. Maynard, shrinkage should be between 15 and 25 wires per shift, but Ms. Gee went as high as 300 or 400 wires. He discussed the problem with her and gave her a considerable amount of his own time to attempt to train her better, but to no avail.

On January 16, 1973, Ms. Gee returned to Mr. Maynard's supervision, this time as a mount inspector-coil feeder. Mr. Maynard made thorough contemporaneous notes on Ms. Gee's performance. He gave her special instruction on how to start the machine, to

which she did not resond. A number of other operators wre assigned to work with her, and each of them said that she wasn't catching on. On January 30, 1973, she unexpectedly started up her machine while a maintenance man had both of his arms inside it. A major accident was avoided only by luck. On another occasion, she laid her glasses down inside her machine while it was running and jamming it. Mr. Maynard assigned Linda Krebs, a coworker, to assist Ms. Gee for ten working days. She improved considerably, but no enough in his judgment. On March 20, 1973, Mr. Maynard warned Ms. Gee that she would be disqualified within ten days if her work did not substantially improve. On March 26, 1973, Mr. Maynard observed Ms. Gee's work station "in a mess." In addition, her log of coils was almost illegible. On April 2, 1973, Ms. Gee was disqualified. According to Mr. Maynard, she made a sincere effort but was unable to do the job, primarily because her hands and fingers were too large to deal with the delicate work required.

The Court is persuaded that Mr. Maynard's actions were not based on any racial motivation. He made a good-faith judgment about Ms. Gee's ability to perform two particular jobs. There is no persuasive evidence that these stated reasons wre merely pretextual. When Ms. Gee was replaced (and this is true of all the employees involved here), her position was filled on a strict seniority basis, a system that is not illegal in and of itself. International Bh'd of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Nor was Ms. Gee verbally abused or harassed, for racial reasons or otherwise. Her supervisor did speak with her a number of times in an effort to encourage better performance, but these visits were reasonable and required by the supervisor's own responsibilities.

3. Christine Vaughn.

The plaintiff Vaughn was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor grade 4, at the wage rate of $2.20 per hour. On or about

November 16, 1970, she was transferred to supervisor Oscar Brazil's section as a sealex machine operator and was then earning $2.54 per hour. On January 25, 1971, she was changed from second to third shift due to a reduction in force and continued working as a sealex operator receiving a general wage increase which raised her rate of pay to $2.69 per hour.

On April 19, 1971, supervisor C. T. Turnage disqualified Ms. Vaughn as a sealex operator. She was placed on an open labor grade 1 job of bulb-loader-hand earning $2.45 per hour. On November 6, 1972, Ms. Vaughn transferred at her request from second to third shift and was then making $2.76 per hour as a bulb-loader. On January 29, 1973, she transferred again at her request to the job of packaging operator-sleeving, a labor grade 3 job, with the same rate of $2.76 per hour. On March 28, 1977, she changed from packaging operator-sleeving to utility operator-simplex incandescent group (SIG) with the rate of pay of $4.46 per hour.

On April 19, 1977, Ms. Vaughn became disabled, but she returned to work on June 13, 1977, as a utility operator earning $4.71 per hour. On January 1, 1979, she was transferred as a result of a reduction in force back to the job of packaging operator-sleeving at the rate of $5.40 per hour. She has continued in this job until the present time.

Ms. Vaughn claims that she was disqualified from the sealex job, declared surplus from other jobs, denied promotional opportunities, issued a written warning for being repeatedly late to work, and verbally abused and harassed by her supervisors, all on account of race. With the exception of her disqualificaton as a sealex operator, all of Ms. Vaughn's changes in jobs were occassioned either by her own request or by a bona fide reduction in force, having the result under Westinghouse's legal seniority system of "bumping" her to another job. In addition, there were attendance problems with Ms. Vaughn which are amply documented in the company's records. There is no

eveidence that she was verbally abuse or harassed, on account of race or for any other reason. With respect to these claims, the Court holds that the defendant has borne its burden.

The result is otherwise, however, with regard to Ms. Vaughn's claim that she was disqualified as a sealex operator on account of her race. The Court has carefully considered the testimony of defendant's witnesses on this point and has studied each of the exhibits offered with respect to Ms. Vaughn's work record as a sealex machine operator. As noted above, on January 25, 1971, she was transferred from second to third shift because of a reduction in force. She had been a sealex operator on second shift under O. D. Brazil, and transferred to the same job on third shift under C. T. Turnage. Mr. Brazil's employee evaluation form with regard to Ms. Vaughn, dated January 20, 1971, states that her quality and quantity of work were poor and that she could not make production. Mr. Brazil also stated

that he would not rehire Ms. Vaughn. On the other hand, she got along well with others, and Mr. Brazil had no supervisory problems with her. Most important of all, a form dated January 18, 1971, signed by both Ms. Vaughn and Mr. Brazil, stated that she had had "previous satisfactory experience" as a sealex machine operator on the second shift. The Court must conclude that, although Mr. Brazil had some problems with her, he did not consider them serious enough to label her work "unsatisfactory." She then began work under Mr. Turnage's jurisdiction. On March 9, 23, 24, and 30, and on April 15, 1971, Mr. Turnage warned Ms. Vaughn about production problems, including what he believed to be too many burned wires. Finally, on April 19, 1971, Mr. Turnage disqualified her, stating that although she got along well with others, he had been unable to motivate her, and believed she had no interest in the job of sealex machine operator. Her disqualification form stated that she would not be eligible to hold this job in the future.

The Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated, in substantial part by racial reasons. Racial motivation is often difficult to isolate. In the nature of things, it will rarely appear on the surface, or at any rate has rarely done so in recent years. The Supreme Cort has warned that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. International Bh'd of Teamsters v. United States, supra, 431 U.S. at 343 n. 24, 97 S.Ct. 1843; Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). The prima facie case made here did not relate specifically to disqualifications of employees, but the evidence recounted above is sufficient to show that Westinghouse maintained a stratified job environment. The more desirable jobs, for whatever reason, were held by white people, in general. The resulting pervasive atmosphere makes it incumbent upon Wetinghouse, if it is to

prevail, to show that the proof on its side is preponderant. The quality of proof with respect to Ms. Vaughn falls short, in this Court's opinion, of that offered with respect to the other two individual defendants. She was never a discipline problem and was always cooperative. She had difficulty with absenteeism, but not so great as to warrant dismissal. She has served in a variety of capacities, including a utility operator, an employee who must operate a number of different machines in quick succession. In addition, Ms. Vaughn received increases in pay while she was a sealex machine operator and, in fact, was being paid the top rate at the time of her disqualification. A "bump sheet," representing the state of the company's records as of January 1, 1979, indicates that she had previously performed the sealex machine operator's job satisfactorily. She unquestionably had problems with production, but the absence of objective production criteria makes it difficult for the Court to hold that these problems were serious enough to meet the

burden imposed on the defendant by law. Apparently defendant's supervisors had numerical standards to judge performance, but these standards were not communicated to the employees and were not revealed to the Court in testimony. Furthermore, employees are not given any chance to re-qualify for a certain job after they have been disqualified. There was testimony that an employee with relevant experience could try out for such a job again, but how could Ms. Vaughn have obtained this experience? The only way to obtain experience operating a sealex machine is to operate the machine, and this is the very opportunity that was denied her by the defendant.

In short, this is a case where the McDonnell Douglas rules as to burden of proof are dispositive. Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's prima facie case with respect to Ms. Vaughn's disqualification.

These findings of fact and conclusions of law dispose of the liability issues in this case. The question of relief remains. The Court would like submissions from the parties covering the following questions, together with any othe issue the parties believed shoudl be addressed: (1) Should Ms. Vaughn be immediately reinstated as a sealex mahcine operator, or should she simply be declared eligible to bid, under the company's seniority system, on the next job opening in that category? (2) If Ms. Vaughn is reinstated as a sealex machine operator, should the company be required to institute objective performance criteria by which her fitness to retain the job can be assessed? (3) What amount of money will compensate Ms. Vaughn for the difference in pay she has actually received, and the pay she would hve received had she not been disqualified as a sealex operator in 1971? (4) What prospective equitable relief should the Court order?

Plaintiffs should file their memorandum on or before May 20, 1979, and defendant should reply on or before June 1, 1979.

## SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO RELIEF

The Court has before its plaintiffs' Memorandum in Support of the Court's Findings as to Relief, filed May 18, 1979, and defendants' Response to Relief Requested on Behalf of Plaintiff Vaughn, filed June 1, 1979. These memoranda concern the question of what relief should be included in this Court's final judgment.

[10] The Court is not persuaded that Ms. Vaughn, the prevailing plaintiff, should be immediately reinstated as a sealex machine operator. She should and will be declared immediately eligible to bid on the next available sealex job, but to order her immediate reinstatement woul violate the lawful seniority system included in the the governing collective barginaing agreement. It would also displace some innocent employees who are not parties to this case and have had no notice that their rights or status might be affected. Ms. Vaughn will therefore be

delcared immediately eligible to bid on the next available sealex job. When such a job does become available, her bid will be evaluated according to the seniority system, which has been uniformly and lawfully applied.

[11] There is something to be said for objective performance criteria, and the defendant could perhaps avoid some legal difficulties in the future if it adopted such criteria for evaluation of employees. This Court, however, is not going to impse such an obligation as part of its judgment. the Court has neither the inclination nor the talent to involve itself in management decisions of this nature. Such objective statistical criteria for job performance, though they no dout could be devised, would inevitably present difficult questions of application to individual cases, unless they are to be mechanically applied in every instance, without regard to the circumstances of individual employees. The Court is not persuaded that the imposition of such a requirement is necessary to vindicate the statute.

[12] Ms. Vaughn should receive bankpay in the amount of $1,696.25, the total difference in her pay between April 19, 1971, the date of her unlawful disqualification, and May 30, 1979. Defendant argues that she failed in her duty to mitigate damages, but the Court does not agree. It is true that Ms. Vaughn could have bid on another labor grade four job six months after her disqualification as a sealex machine operator. It is also true that she stated in 1976 that there were no particular higher-paying jobs at the plant for which she would like to be trained. In addition, on January 1, 1979, Ms. Vaughn was shown a company record that appeared to list her as a qualified sealex machine operator, but took no steps to bid on such a position after seeing this record.

None of these events cuts off her entitlement to backpay. She was unlawfully disqualfied as a sealex machine operator, a job that she wanted, and she did not become again qualified for this position until this Court's ruling. The January 1, 1979,

company record is said by the company to be a mistake, and if Ms. Vaughn had attempted to use it in bidding for a sealex machine operator's job, she would undoubtedly have been met with this reply. If the company had come to her and told her unequivocally that she was eligible to bid on a sealex machine operator's position, and if she had then declined to bid, the defendant would have a point, but that is not what happened. The judgment will therefore contain an award in Ms. Vaughn's favor of $1,696.25, as noted above. In addition, backpay will continue to run in her favor until she is given an opportunity to bid on a sealex machine operator's job and is awarded the job, this relief being necessary to make her whole.

[13] The judgment will also contain an injunction forbidding the defendant from discriminating against any employees in respect of pay, conditions of employment, criteria for demotion, promotion, or disqualification, and the like, on the basis of race. The finding of violation in

Ms. Vaughn's favor is an ample basis for such an injunction, especially in view of the prima facie case of plant-wide discriminatory practice set forth in this Court's opinion filed May 10, 1979.

Judgment is being entered in accordance with this opinion.

JUDGMENT

This case having come on for trial to the Court on April 24, 25, 26, 27, and 30, 1979; all parties having rested; this Court having filed its opiion dated May 10, 1979, containing findings of fact and conclusions of law; the defendants' motion under Fed.R. Civ.P. 59(a)(2) for amended findings of fact and conclusions of law having been denied by order dated May 23, 1979 this Court having made its supplemental findings of fact and conclusions of law with respect to relief in an opinin dated June 12h, 1979; and the Court being well and sufficiently advised in the premises,

It is by the Court this 12th day of June, 1979, CONSIDERED, ORDERED, ADJUDGED,

and DECREED:

1. That the complaints of Marion Gee and Glenda Crutcher be, and they are hereby, dismissed with prejudice.

2. That the plaintiff Christine VAughn have and recover of and from the defendant Westinghouse Electric Corporation judgment in the amount of $1,696.25, representing backpay to and including May 30, 1979.

3. That the defendant Westinghouse Electric Corporation be, and it is hereby, ordered and directd to permit the plaintiff Vaughn to bid on the next available sealex machine operator's job under the term sof its collective-bargaining agreement, her bid to be evaluated on the basis of defendant's lawful seniority system.

4. That plaintiff Vaughn have and recover judgment of and from the defendant Westinghouse Electric Corporation in whatever additional amount may be appropriate tomake her whole for losses incurred betweetn June 1, 1979, and the date she received a sealex machine operator's job, this amount to be computed in accordance

with submissions of the parties to be made at the appropriate time.

5. That the defendant Westinghouse Electric Corporation, its agents, servants, and employees, be, and they are hereby enjoined and restrained from failing or refusing to hire, from discharging, and from otherwise discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, including promotion, demotion, and disqualification from particular jobs, because of such individual's race or color.

6. That in addition to the monetary award made herein, plaintiff have and recover judgment of and from the defendant Westinghouse Electric Corporation in the amount of her costs expended in this action, all monetary awards to bear interest at the rate of ten per centum per annum from and after the date of the entry of this judgment (except the award to be computed i the future under paragraph 4 of this judgment), but with no addition for pre-judgment interest, since the amount of

defendant's liability could not be reasonably ascertained until this Court had ruled.

For all of which, let execution issue, at the time and in the manner provided by law.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHRISTINE VAUGHN AND
MARION GEE, PLAINTIFFS,

V. NO. LR-74-C-215

WESTINGHOUSE ELECTRIC CORP.;
INTERNATONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO
LOCAL 1136 OF INTERNATIONAL
BROTHERHOOD OF
ELECTRICAL WORKERS, DEFENDANTS,

and

GLENDA CRUTCHER, PLAINTIFF,

V. NO. LR-76-C-196

WESTINGHOUSE ELECTRIC CORP., DEFENDANT.

ORDER

The motion of defendant Westinghouse under Fed. R. Civ. P. 59 (a)(2) for amended findings of fact and conclusions of law is denied.

This Court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its reason for disqualifying

the plaintiff Vaughn was not pretextual. The opinion is therefore fully obedient to the teaching of Board of Trustees of Keene State College v. Sweeney, _____ U.S. _____, 18 FEP Cases 520 (November 13, 1978). Defendant simply failed to articulate a legitmate, nondiscriminatory reason for Ms. Vaughn's disqualification.

On May 18, 1979, plaintiffs filed a memorandum discussing the appropriate remedy to be included in the judgment. The Court expects defendant's reply on or before June 1, 1979, as indicated in the opinion of May 9, 1979. This memorandum should address the questions posed on page 14 of the opinion.

IT IS SO ORDERED this 23rd day of May, 1979.

RICHARD S. ARNOLD,
United States District Judge

APPENDIX B

Chiristine VAUGHN and Marion Gee, Appellees,

v.

WESTINGHOUSE ELECTRIC CORPORATION, Appellant.

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No. 79-1561

United States Court of Appeals,
Eighth Circuit.
Submitted Feb. 12, 1980.
Decided April 23, 1980.
Rehearing and Rehearing En Banc
Denied May 23, 1980.

Before GIBSON, Senior Circuit Judge, and HEANEY AND STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This is an appeal by defendant-appellant, Westinghouse Electric Corporation (Westinghouse), from the district court's [1] finding of racial discrimination by Westinghouse against plaintiff-appellee, Christine Vaughn. The district court held Vaughn prevailed on her claim of disparate treatment because of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et esq. On appeal

Westinghouse alleges (1) the district court misapplied the appropriate burden of proof standards and (2) the district court's factual findings are clearly erroneous. We affirm.

I. Background

The district court found against two other plaintiff employees in this case and found against Vaughn on all claims except her claim that Westinghouse was guilty of race discrimination when it disqualified her as a sealex machine operator. Vaughn v. Westinghous Electric Corp. 471 R. Supp. 281 (E.D. Ark. 1979). Neither Vaughn nor the other plaintiffs have filed a cross-appeal concerning these findings. Therefore, the only issue before us is whether the district court properly found Westinghouse had discriminated against Vaughn bacause of her race in disqualifying her as sealeax machine operator.

Vaughn, a black, was hired by Westinghouse on July 13, 1970, as a sealex

machine operator, labor grade 4, at $2.20 per hour. On November 16, 1970, she was transferred to a second shift section under the supervision of O. D. Brazil as a sealex machine operator and was earning $2.54 per hour. On January 25, 1971, she was changed from second to third shift due to a reduction in force, though she testified she preferred the second shift. She continued as a sealex operator under C. T. Turnage on the third shift and was earning the top wage rate of $2.69 per hour for sealex operators. On April 19 1971, she was disqualified as a sealex operator by Turnage and placed on an open labor grade 1 job of bulb-loader-hand earning $2.45 per hour. She has continued to work at Westinghouse and at the time of trial was working as packing operator-sleeving, labor grade 3, at the rate of $5.40 per hour.

At the time Vaughn was transferred from sealex operator on the second shift, Brazil, as her supervisor, completed an employee evaluation form concerning Vaughn's performance. It was dated January

20, 1971, and stated her quality and quantity of production were poor, and that he would not rehire her because of her problems making production. On the other hand, it stated she got along well with others and presented on supervisory problems. Additionally, a form dated January 18, 1971, and signed by both Brazil and Vaughn, stated she had had previous satisfactory experience as a sealex machine operator under Brazil did not present serious enough problems to label it unsatisfactory.

Under Turnage's jurisdiction, Vaughn was verbaly warned on March 9, 23, 24, 30 and April 15, 1971, that she was having production problems, including what Turnage felt was an inadequate number of lamps sealed, and too many burnt wires. Turnage made notes of these verbal warnings, which were introduced at trial. During his talk with Vaughn on April 15, 1971, he apparently informed her that if she did not improve, he would have to use "stronger disciplinary action." On April 19, 1971,

she was disqualified from her job as sealex operator. Vaughn disputed that she had prior warnings of this action, and testified she felt she was disqualified under orders from the front office, and was unsure of the reason why. Turnage's notes form the meeting indicated it was due to her dislike for the job and the number of burnt wires. The disqualification form noted she could not hold this job in the future and stated that although she got along well with others and had good attendance, he was unable to motivate her and she showed no interest in thejob as sealex machine operator.

The district court held that plaintiffs had established a prima facie case of racial discrimination under the rationale of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.CT. 1817, 36 L.Ed.2d 668 (1973). Vaughn v. Westinghouse Electric Corp., supra, 471 R. Supp. At 286. It then held that Westinghouse failed to demonstrate proof sufficient to over come plaintiffs' prima facie case with respect to Vaughn's disqualification. Id. at

289-90. It awarded Vaughn back pay of $1,696.25, to continue to run in her favor until she was given an opportunity to bid on a sealex machine operator job. Id. at 291.

II. Analysis

Under McDonnell Douglas, a Title VII case is divided into three phases. First the plaintiff must demonstrate a prima facie case of racial discrimination. Then the defendant has the burden of "articulating" or "proving" a legitimate nondiscriminatory reason for its action. If this is done, plaintiff is afforded an opportunity to show that the proffered reason is a pretext for what is in fact illegal discrimination. Clearly the burden on the defendant is one of production; the ultimate burden of persuading the fact-finder that there has been illegal discrimination resides always with the plaintiff. This court has recently clarified its understanding of the order and allocation of proof in a disparate treatment

situation, see Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir.,1980).

The requirements for demonstrating a prima facie case of disparate treatment were stated in McDonnell Douglas to be: (i) that [the employee] belongs to a racial minority; (ii) that her applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 802,93 S.Ct. at 1824.

The Supreme Court noted that the proof required to establish a prima facie case will necessarily vary in different factual situations. Id. at 802 n. 13, 93 S.Ct. at 1824.

The Supreme Court noted that the proof required to establish a prima facie case will necessarily vary in different factual

situations. Id. at 802n. 13, 93 S.Ct. at 1824. In analyzing the case the district court applied the McDonnell Douglas approach to the disqualification situation. It found a prima facie case to be demonstrated because (1) Vaughn belonged to a racial minority; (2) she was employed as a sealex operator having been orginially qualified; (3) she was disqualified; and (4) following the disqualification Westinghouse employed another person (in fact a white person) to occupy her former position. The district court relied on statistics indicating disparate treatment in the employment of blacks at the Little Rock plant, see Vaughn v. Westinghouse Electric Corp., supra, 471 F.Supp. 284-85; on the testimony of the parties; and on the specifically credited testimony of a plant worker, Wilma Donley, who testified to individual instances of discriminatory treatment. Id. at 285-86.

[1] Having conceded the plaintiffs have demonstrated a prima facie case, the first contention of Westinghouse on appeal is that the district court applied an

incorrect standard to defendant's burden in response to the prima facie ease. The burden placed on the employer to meet plaintiffs' prima facie case under the McDonnell Douglas analysis was further explained in Furnco Construciton Corp v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 LEd.2d 216 (1978). In Furnco, the Court stated:

When the prima facie case is understood in the light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. * * * To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, supra, 411 U.S.,at 802, [93 S.Ct. at 1842].

Furnco Construction Corp. v. Waters, supra, 438 U.S. at 577-78, 98 S.Ct. at 2950. The Court further defined "articulating some legitimate, non-discriminatory reason" in Sweeney. In that case the court of appeals had stated McDonnell Douglas required defendant to prove absence of discriminatory motive. The Supreme Court vacated and remanded for reconsideration in light of Furnco, noting that "articulating some legitimate, non-discriminatory reason" did not require proof of the absence of discriminatory motive.

Westinghouse contends that there is language in the dstrict court opinion which is similar to that disapproved in Sweeney. The district court at one point stated it was "not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons." Vaughn v. Westinghouse Electric Corp., supra, 471 F.Supp. at 289-90. The court also concluded:

In short, this is a case where the McDonnell Douglas rules as to burden of proof are dispositive. Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's prima facie case with respect to Ms. Vaughn's disqualification.
Id. at 290.

The district court articulated the correct standard at one point in its opinion,[2] and clearly the standard it applied differs form that prohibited in Sweeney. Nevertheless we believe it could be interpreted as contrary to the teachings of that opinion. We are persuaded, however, that any doubt about whether the district court applied the appropriate test was resolved in its unpublished order of May 23, 1979. That order denied a motion by Westinghouse for amended findings of fact and conclusions of law and clarifed the test the court had applied:

> This court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its

> reason for disqualifying the plaintiff Vaughn was now pretextual. The opinion is therfore fully obedient to the teaching of Board of Trustees of Keene State College v. Sweeney, [439 U.S. 24, 99 S.Ct. 295, 58 L. Ed.2d 216 (1978)]. Defendant simply failed to articulate a legitimate, nondiscriminatory reason for Ms. Vaugh's disqualification.

Vaughn v. Westinghouse Electric Corp., No. LR-74-C-215 (E.D.Ark., May 23, 1979) (order). This clearly is an application of the proper test.

The issue now before us is whether the district court's conclusion that Westinghouse failed to articulate legitimate, nondiscriminatory reason for Vaugn's disqualification is clearly erroneous.

Westinghous states its legitimate reason for disqualifying Vaughn was "her immediate superviors's evaluation over a thirty day period that her poor productivity, excessive material waste, and her expressed dislike of a sealex operator's job rendered her unqualified to continue in the position."[3]

We equate the requirement of "articulating a legitimate, nondiscriminatory reason" with "proving the employment decision is based on a legitimate consideration." Furnco uses these phrases interchangeably, and the Court in Sweeney stated "words such a 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context in which they are used." Board of Trustee v. Sweeney, supra, 439 U.S. at 25, 99 S.Ct. at 295.

[2] Therefore, while the burden of persuassion for demonstrating discrimination remains with the employee, the burden of producing evidence of a legitimate reason for the employment practice shifts to the employer. The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually. Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255-56 (5th Cir. 1977). Accord Silberhorn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978); Jones v. Texas Air National Guard, 584 F.2d

104 (5th Cir. 1978); Whiteside v. Gill, 580 F2.d 134 (5th Cir. 1978). These cases do not alter the fact that the ultimate burden of persuasion remains with Vaughn and simply requires Westinghouse to prove the legitimacy of its articulated reason by a preponderance of the evidence. See generally Franks v. Bowman Transportation Co., 424 U.S. 747, 772, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444 (1976); Lombard v. School District, 463 F.Supp. 566, 571 (W.D. Pa.1978). Cf. Furnco Construction Co. v. Waters, supra, 438 U.S. at 578, 98 S.Ct. at 2950 (stating the burden on the employer is to demonstrate "proof of a justification which is reasonabley related to the achievement of some legitimate goal"). Clearly this is obedient to Sweeney and does not require proof of the absence of discriminatory motive. Board of Trustees v. Sweeney, supra, 439 U.S. at 25,99 S.Ct. at 296.

[3] The district court concluded that Westinghouse had not articulated a legitimate reason for the disqualification. It

noted that stated reason was poor production, but observed a company form dated January 18, 1971, and signed by both Vaughn and her supervisor, Brazil, indicated satisfactory performance on the second shift, and a bump sheet dated December 8, 1978, indicated prior satisfactory performance during the second and third shifts as a sealex operator. The district court forund her to be cooperative and not discipline problem and noted she received increases in pay as a sealex operator and in fact was being paid the top rate at time of her disqualification. Vaughn also contested the testimony that she had been made aware of the gravity of her production problems. Turnage stated both production quantity and quality were poor, and below other shifts, but the company had not articulated objective standards indicating what stisfactory production levels were. the district court concluded that although Vaughn "unquestionably had problems with production, * * * the absence of objective production criteria makes it difficult for the court to hold these problems were

serious enough to meet the burden imposed on the defendant by law." Vaughn v. Westinghous Electric Corp., supra, 471 F.Supp at 290.

We interpret the district court's decision, as clarified by its May 23, 1979, order, to state that although reasons were articulated, i. e., poor production, given the opposing evidence concerning production and the absence of objective production criteria, Westinghouse failed to demonstrate the legitimacy of its articulated reason by a preponderance. See Cosby v. United States, 472 F.Supp. 547, 552-53 (S.D.Ohio 1979).
"[A]ffirmation of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 343 n.24, 97 S.Ct. 1843, 1858, 52 L.Ed.2d 396 (1977) (quoting Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31, L. Ed.2d 536 (1972)).

[4] While in viewing the evidence from the trial we might be of the opinion

that Westinghouse articulated a legitimate reason for Vaughn's disqualification, we may not substitute our views for that of the district court. Fed.R.Civ.P. 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Applying the standard, we are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

[5] Beeause the district court concluded Westinghouse failed to meet its burden of production, Vaughn was not required to show that the reasons were pretextual.[4] If the employer cannot "prov[e] that he based his employment decision on a legitimate consideration," then he has failed "[t]o dispel the adverse influence from a prima facie case showing

under McDonnell Douglas." Furnco Construction Co. v. Waters, supra, 438 U.S. at 577-78, 98 s,ct, at 2950.

The district court's judgment that Vaughn was unlawfully disqualified form her job as sealex machine operator is affirmed.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting.

I view the district court's finding that Westinghouse failed to demonstrate the legitimacy of its articulated reason for disqualifying Vaughn to be clearly erroneous in light of the evidence produced at trial, and I respectfully dissent. The evidence clearly demonstrates that Westinghouse met its burden of showing by a preponderance of the evidence that a legitimate reason for the disqualification existed.

In the district court, Vaughn claimed that she was disqualified from the sealex position, declared surplus from other jobs, denied promotional opportunities, issued a

written warning for being repeatedly late for work, and verbally abused and harassed for work, and by her supervisors, all on account of her race. With regard to these claims the district court found:

> With the exception of her disqualification as a sealex operator, all of Ms. Vaughn's changes in jobs were occasioned either by her own request or by a bona fide reduction in force, having the result under Westinghouse's legal seniority system of "bumping" her to another job. In addition, there were attendance problems with Ms. Vaughn which are amply documented in the company's records. There is no evidence that she was verbally abused or harassed, on account of race or for any other reason. With respect to these claims, the Court holds that defendant has borne its burden.
>
> The result is otherwise, however, with regard to Ms. Vaughn's claim that she was disqualified as a sealex operator on account of her race. * * * As noted above, on January 25, 1971, she was transferred from second to third shift because of a reduction in force. She had been a sealex operator on second shift under O.D. Brazil, and transferred to the same job on third shift under C.T. Turnage. Mr Brasil's employee evaluation form with regard to Ms. Vaughn, dated January 20, 1971, states that her quality and quantity of work were poor and that she could not make production. Mr. Brazil also stated that he would not rehire Ms. Vaughn. On the other hand, she got along

> well with others, and Mr. Brazil had no supervisory problems with her. Most important of all, a form dated January 18, 1971, signed by both Ms. Vaughn and Mr. Brazil, stated that she had had "previous satisfactory experience" as a sealex machine operator on the second shift. The court must conclude that, although Mr. Brazil had some problems with her, he did not consider them serious enough to label her work "unsatisfactory." She then began work under Mr. Turnage's jurisdiction. On March 9, 23, 24, and 30, and on April 15, 1971, Mr. Turnage warned Ms. Vaughn about production problems, including what he believed to be too may burned wires. Finally, on April 19, 1971, Mr. Trunage disqualified her, stating that although she got along well with others, he had been unable to motivate her, and believed she had no interest in the job of sealex machine operator. Her disqualification form stated that she would not be eligible to hold this job in the future.

Vaughn v. Westinghouse Electric Corp., 471 F.Supp. 281, 289 (E.D.Ark.1979) (emphasis Added).

A review of these findings reveals only one major fact that may dispute Westinghouse's assertions that Vaughn was disqualified for production problems.[1] Vaughn and one of her supervisors, Brazils, signed a form on January 18, 1971, stating that Vaughn had "previous stisfactory experience" as a sealex machine opertor during the second shift (3:00 p.m. to 11:00 p.m.). The district court, however, also

found that Brazil did have problems with Vaughn, as was evidenced by his employee evaluation of her, which he made two days after the form was signed. Brazil's evaluation found Vaughn's quality and quantity of work poor and stated that "she could not make production." After Vaughn's legitimate transfer to the "graveyard" shift (11:00 p.m. to 7:00 a.m.), her new supervisor, Turnage, experienced similar productin problems. Three months later, Turnage, after warning Vaughn, disqualified her from the sealex position. Vaughn was not dismissed, however, by Westinghouse. She was transferred to a job of bulb loading which paid twenty-four cents less an hour than the sealex position. These facts are devoid of any connotation whatsoever of racial discrimination. The only discrimination against Vaughn was because of her poor and sloppy work. The Civil Rights Act of 1964 is not thought to have been passed to preseve sinecures for people, regardless of their race, who do not want to perform resonably satisfactory work. Vaughn's productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward substandard performance.

These facts, even when viewed in a light most favorable to Vaughn, only demonstrate that the supervisor, Turnage, may have had a higher production standard for his shift employees than did Vaughn's previous supervisor, Brazil. Turnage and Westinghouse ahd a legitmate, non-discriminatory reason for disqualifying Vaughn unless a uniform production standard among shifts or supervisors is a prerequisite to a legitimate disqualification.[2] I do not believe that Title VII of the Civil Rights Act of 1964 ever envisaged requiring uniform production standards or mandating how businesses should produce their products. Their requirment would result in government supervision of each and every stage of the production process.[3] In addition, the paperwork involved in developing and maintaining objective production standards would be titanic. Perhaps this would be yet another contributing factor in the comparatively low productivity suffered by our country in recent years.

I would reverse and remand to the district court in order to afford Vaughn an opportunity to show that Westinghouse's reason for disqualification is a pretext for illegal discrimination.

FOOTNOTES

1. The Honorable Richard S. Arnold, United States District Judge for the Eastern District of Arkansas. Judge Arnold assumed the office of Judge of the United States of Appeals for the Eighth Circuit on March 7, 1980.

2. "Under McDonnell Douglas, the burden then shifts to the defendany to show that the personnel actions taken were based upon some legitimate, nondiscriminatory reason." Vaughn v.

3. Brief of appellant at 24. This is similar to the reasons stated in Trunage's note of the April 19, 1971, meeting between Turnage and Vaughn. The note states Vaughn was disqualified "due to her obvious dislike for her job, the number of operator burned wires and the fact they were no better after repeated talks and warnings, and her production which had been unsatisfactory and getting no better."

4. It should be noted that, if required, much of the evidence used by the district court in finding a prima facie case might go to whether the employers's articulated reason is pretextual. McDonnell Douglas states the statistical evidence submitted by plaintiffs is helpful in showing pretext. So would testimony of Vaughn and others relating to individual instances of discrimination. Thus the district court in the present case alternatively could have found the reasons articulated by Westinghouse to be legitimate and

nondiscriminatory, but, based on the statistical evidence, testimony, and lack of objective production standards, the reasons to be a pretext for discrimination. As noted by the Third Circuit, [T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that trhere has been illegal discrimination resides always with the Plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form, but in order to determine whether the decidion on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards. Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3d Cir. 1979) (footnotes omitted).

FOOTNOTES-DISSENT

1. The district court also noted the existence of a "bump sheet" dated December 8, 1975, representing the state of the company's records as to January 1, 1979, that indicated that Vaugn had previously performed the sealex machine operator's job satisfactorily. 471 F.Supp. at 290. Westinghouse produced testimony stating that this report was a clerical error.

2. The application of such a prerequisite was suggested in the district court's opinion. "She [Vaughn] unquestionabley had problems with production, but the absence of objective production criteria makes it difficult for the Court to hold that these problems were serious enough to meet the burden imposed on the defendant by law." 471 F.Supp. at 290.

3. A number of interesting questions arise if such a requirement were imposed. Should

a uniform requirement be applied to all workers on a particular shift, or among shifts, or among plants? Note that if a uniform requirement were imposed on a particular shift, Vaughn would have to have been disqualified by Brazil ("she could not make production"); if she were not, any other employee who could make out a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (19730, could prevail in a civil rights action against Westinghouse since Westinghouse would be unable to rebut the prima facie case.

# APPENDIX C

## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

79-1561 September Term, 1979

| | | |
|---|---|---|
| Christine Vaughn, et al., Appellees, | ) | |
| | ) | Appeal from |
| vs. | ) | the U.S.D.C. |
| | ) | for the E.D. |
| Westinghouse Electric Corp. | ) | of Arkansas |
| Appellant. | ) | |

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Bright and Judge Henley would grant the petition for rehearing en banc. Judge Arnold took no part in the decision.

May 23, 1980

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-276

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

CHRISTINE VAUGHN and MARION GEE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION

JACK GREENBERG
O. PETER SHERWOOD*
CLYDE E. MURPHY
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

JOHN WALKER
1191 First National Bldg.
Little Rock, Arkansas 72201

ZIMMERY CRUTCHER, JR.
MAYS, CRUTCHER & BROWN
One Union National Plaza
Suite 836
Little Rock, Arkansas 72201

*Attorneys for Respondents*

* Counsel of Record

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No. 80-276

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN and MARION GEE,

Respondent.

==========

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

==========

# BRIEF IN OPPOSITION

==========

## STATEMENT OF THE CASE

This case presents questions concerning the proper allocation of the burden of producing evidence in a lawsuit brought pursuant to Title VII

of the Civil Rights Act of 1964, and whether the District Court's opinion in this case may be held to be clearly erroneous. The Eighth Circuit held that the District Court's opinion was consistent with the decisions of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Reviewing the record and the District Court's reasoning, the Court of Appeals held that the lower court correctly concluded that the defendant, Westinghouse Corporation, failed to meet its burden of articulating a legitimate nondiscriminatory reason for the disqualification of the plaintiff. Moreover, the Court of Appeals noted that even if the District Court had found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, there was sufficient evidence in the record to find those reasons to be a pretext for discrimination.

The Eighth Circuit denied the defendant's petition for rehearing en banc or by the panel, and the defendant subsequently filed its petition For Writ Of Certiorari.

## SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for three reasons: (1) The petitioner has distorted the record and misconstrued the holdings of the Courts below in a manner which obscures the issues and the findings in this case; (2) The Eighth Circuit's holding that in seeking to rebut the employee's prima facie case by articulating a legitimate nondiscriminatory reason, the employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually; as well as its alternative holding that even if such reasons were found to have been articulated, the record supported a finding that the reasons were a pretext for discrimination, are consistent with the decisions of this Court; (3) The holdings of the Eighth Circuit are fully consistent with the decisions of the other Circuits.

## ARGUMENT

### Reasons For Denying The Writ

I. THE PETITION FOR CERTIORARI DISTORES THE RECORD AND MISCONSTRUES THE HOLDINGS OF THE COURT BELOW.

Ignoring the full and accurate statement of the facts by the two courts below, see 620 F.2d at 656-657 (Pet. App. B at 2-6);[1/] 471 F. Supp. at 283-290 (Pet. App. A at 2-31), the petitioner now seriously distorts the record and has misconstrued the holdings of those Courts in its quest for new factual findings in this Court. This effort fails to recognize that this Court simply does not sit to resolve disputed issues of fact.

First, following a trial to the Court of five days, the District Court[2/] carefully considered the evidence before it and concluded that ". . .

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1/ Citations in this form refer to the appendix to the petition.

2/ The Honorable Richard S. Arnold, United States District Court Judge for the Eastern District of Arkansas, assumed the office of Judge of the United States Court of Appeals for the Eighth Circuit on March 7, 1980.

the proof is more than sufficient to establish a prima facie case". 471 F. Supp. at 284 (Pet. Ap. A at 5). In support of this conclusion the Court noted a wealth of evidence, including the highly credible testimony of Ms. Wilma Donley, id. at 285 (Pet. App. at 9-12); a careful consideration of the testimony of plaintiff Vaughn and the defendant's witnesses, id. at 289-290 (Pet. App. A at ); a review of the exhibits, id. at 289; and a visit to the Westinghouse plant by the Court, id. at 287; as well as a highly persuasive statistical case pointing to the discriminatory practices of the defendant, and concluded that the defendant had:

> . . . simply failed to persuade this Court that its proof is sufficient to overcome plaintff's prima facie case with respect to Ms. Vaughn's disqualification.

471 F. Supp. at 290 (Pet. App. A at 30).

For example, the evidence demonstrated that the defendant had a history of discrimination going back to the effective date of Title VII.[3/]

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3/ July 2, 1965.

The Court found that at that time, " . . . almost no blacks were employed by the defendant Westinghouse". Id. at 284 (Pet. App. A at 5). Similarly, noting that the situation had changed rather slowly, the Court went on to find that presently only 3 of 22 office and clerical employees were black; no blacks had ever been employed as supervisors in the defendant's office force; only 2 of 25 or 26 supervisors who held entry-level management jobs were black; and that while the defendant's overall work-force was roughly representative of the proportion of blacks and whites in the relevant population, blacks were almost exclusively concentrated in production jobs, "which are lower paying". Id. at 284 (Pet. A at 6).

Similarly telling was the Court's finding that given the high number of blacks applying for jobs at Westinghouse; the disproportionately low numbers of blacks obtaining positions; and the inability of the defendant's personnel manager to explain these figures; "[T]he inference is very strong indeed that the number of black people hired is being artificially depressed". Id. at 284 (Pet. App. A at 7). Accord, International

Brotherhood of Teamsters v. United States, 431 U.S. 324, 339, n.20 (1977).

The Court's opinion goes on to cite additional statistical evidence supportive of plaintiff's particular claim, including the fact that of 65 persons discharged between 1972 and 1978, 39 or 60% were black, "a figure far above the overall proportion of black employees, which now is at a high of about 24 or 25%."[4/] Id. at 285 (Pet. A at 9).

In the context of this type of statistical data the Court succinctly expressed its view with respect to the fact that no specific qualifications had been set out by the employer for either production-line jobs or supervisory jobs.

> Subjective criteria for employment are not illegal in themselves but the fact that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.

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4/ See 471 F. Supp. at 284-185 (Pet. App. A at 7-9) for additional discussion of the racial stratification of the defendant's workforce.

471 F. Supp. at 285 (Pet. App. A at 9).[5/]

The defendant's petition relies on the notion that the Court[s] below required the defendant to establish "objective standards" for disqualification of employees as a prerequisite to meeting its burden of "articulating a nondiscriminatory reason" for the disqualification of the plaintiff. However, neither of the Courts below imposed such a requirement. In fact the District Court specifically rejected such a course, see 471 F. Supp. at 291. (Pet. App. A at 33), and the Court of Appeals made no mention of such a standard. Rather, both Courts found that in light of the statistical and documentary evidence, and the conflicting nature of testimony offered at trial, the defendants disputed statements regarding plaintiff's poor production did not suffice to overcome plaintiff's strong prima facie case.

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5/ Compare Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972) cert. denied 409 U.S. 862 (1972) "... [t]he lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's workforce."

This view is well-stated by the Eighth Circuit at 620 F.2d at 660 (Pet. App. B at 16):

> [w]e interpret the district court's decision, as clarified by its May 23, 1979, order, to state that although reasons were articulated, i.e., poor production, given the opposing evidence concerning production and the absence of objective production criteria, Westinghouse failed to demonstrate the letitimacy of its articulated reason by a preponderance . . . 'Affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' International Brotherhood of Teamsters v. United States, 431 U.S 324, 343 n.24 (1977) (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (9172). (emphasis added)

Thus, the petition distorts the record by failing to adequately inform the Court of the basis for the lower Court's holding and further misconstrues that holding by erroneously asserting the addition of categorical burdens which the Court did not impose.

II. IN HOLDING THAT THE DEFENDANT FAILED TO FULFILL ITS EVIDENTIARY BURDEN OF ARTICULATING A LEGITIMATE NON-DISCRIMINATORY REASON FOR PLAINTIFF'S DISQUALIFICATION, AND, THAT EVEN IF SUCH REASONS HAD BEEN ARTICULATED THE RECORD SUPPORTED A FINDING THAT THE REASONS WERE A PRETEXT FOR DISCRIMINATION, THE DECISION OF THE EIGHTH CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Eighth Circuit held that in seeking to rebut the employee's prima facie case by articulating a legitimate nondiscriminatory reason, "[T]he employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually." 620 F.2d at 649 (Pet. App. B at 13). The Court therefore addressed itself to the specific evidentiary showing necessary in order to comply with this Court's prescription that the employer "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), this Court addressed the issue of the nature of evidence necessary to rebut a prima facie case. There can be no dispute that

the decision in Furnco, expressed the view that the articulation of a legitimate nondiscriminatory reason was synonymous with offering proof as to that reason.

> When the prima facie case is understood in the light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one such as race.

Furnco Construction Corp. v. Waters, supra, 438 U.S. at 577.

The essential flaw in the defendant's petition is its contention that the mere assertion of a proposed reason is, in every case, sufficient to rebut the prima facie case. Nothing in Furnco supports such a view. Indeed there are few if any similarities between Furnco and the case at bar. For example, petitioner asserts that since the Court in Furnco, refused to invalidate the superintendent's evaluation for selection of bricklayers, that the supervisor's disputed evaluation, should have been sufficient in Vaughn to rebut the plaintiff's prima facie

case. This view wholly ignores, however, the fact that in Furnco, there was substantial statistical evidence that the employer's work force was racially balanced and that therefore there was little if any adverse impact as a result of the employer's practices.

> Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated.

Furnco Construction Corp. v. Waters, supra, 438 U.S. at 580.

In Vaughn, however, the statistics pointed to exactly the opposite conclusion. Here, the "probative value" of such statistics was supportive of plaintiff's contention that the employer's decisions were the result of racial animus.

It follows, that while in Furnco, faced with statistical data indicating a racially balanced work force, the Court refused to invalidate the employer's subjective hiring criteria; Vaughn,

offers the contrary situation in which subjective criterial are coupled with gross evidence of disparate treatment.[6/] Vaughn v. Westinghouse Electric Corp., supra, 471 F. supp. at 825 (Pet. App. A at 9).

In Furnco, this Court rejected the Court of Appeals criticism of the employer's effort to use statistics in this type of case, "once a McDonnell Douglas prima facie showing had been made out." Id. at 579. In holding that such proof is probative in rebutting the prima facie case, the Court impliedly asserts the necessity of putting forth some evidence in support of the legitimate reason asserted by the employer.

Contrary to the assertions of the defendant, the Eighth Circuit in Vaughn has made no effort to "add requirements to the established tests set out by this Court." Pet. at 12.

Rather, the Court below merely confirmed that in the face of the statistical, testimonial and

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6/ Moreover as stated supra, the Court below did not invalidate the defendants practices, but merely held that the evidence presented by the defendant was insufficient to rebut plaintiff's prima facie case. 620 F.2d at 659-660 (Pet. App. B at 15-16).

documentary evidence on the record, the District Court was correct in holding that the disputed testimony of the defendant's witnesses was not sufficient to rebut plaintiff's prima facie case. The primary significance of the lack of objective standards in Vaughn, was that given the wealth of evidence-statistical, testimonial and documentary-supporting plaintiff's case, the lack of objective standards was an additional factor serving to corroborate rather than rebut plaintiff's prima facie case[7/] which made the defendant's attempts at rebuttal less credible.

Further support of the Eighth Circuit opinion is found in Board of Trustees v. Sweeney, 439 U.S. 24 (1978). There both the majority and dissenting opinions were in agreement as to the employer's burden to "produce[s] evidence of legitimate non-discriminatory reasons" for his action. Id. at 26.

> In litigation the only way a defendant can 'articulate' the reason for his action is by adducing evidence that explains what he had done.

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7/ See Brown v. Gaston County Dyeing Machine Co., supra, 457 F.2d at 1383.

Board of Trustees v. Sweeney, supra, 439 U.S. at 28 (Stewart, J. dissenting).

The majority's concern in Sweeney was that, rather than requiring proof as to the legitimate nondisriminatory reasons for the employer's actions, the Court there may have required the defendant to "prove absence of discriminatory motive." Id. at 24. In Vaughn, no such requirement was made of the defendant.[8/] It follows from Sweeney and Furnco that the issue is whether there has been a "credible" articulation of a legitimate reason for the employer's actions. However, if as in Vaughn, the evidence in support of this reason is not credible, then the District Court has the power to reject it and hold that the defendant has failed to meet his burden of articulating a legitimate nondiscriminatory reason.

Significantly, in Vaughn, the Eighth Circuit notes that there was sifficient evidence on the record to hold that even if the defendant had

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8/ Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 658-660.

been found to have articulated a legitimate nondiscriminatory reason, the evidence adduced at trial was sufficient to establish those reasons as pretextual.

> It should be noted that, if required, much of the evidence used by the district court in finding a prima facie case might go to whether the employer's articulated reason is pretextual. McDonnell Douglas states the statistical evidence submitted by plaintiffs is helpful in showing pretext. So would testimony of Vaughn and others relating to individual instances of discrimination. Thus the district court in the present case alternatively could have found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, but based on the statistical evidence, testimony, and lack of objective production standards, the reasons to be a pretext for discrimination. As noted by the Third Circuit,
>
> > [T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidece is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form, but in order to determine whether the

> decision on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards. Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3d Cir. 1979) (footnotes omitted).

Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 660 n.4.

In Vaughn, the Court below merely applied the standard articulated by this Court in McDonnell Douglas v. Green, supra; Furnco Construction Corp. v. Waters, supra, and Board of Trustees v. Sweeney, supra, and determined that the defendant failed to offer sufficient evidence that the stated legitimate reason for its action existed factually. See Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255-56 (5th Cir. 1977); Silberhorn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978).

## III. THE HOLDING OF THE EIGHTH CIRCUT IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Court in Vaughn did not require that the defendant establish objective criteria; nor did the Court hold that absent such objective criteria

that the defendant could never, under any circumstances, rebut a prima facie case based on disqualification. Rather the Court simply held that on the basis of this record, given the strength of plaintiff's prima facie case, supported by statistical, testimonial and documentary proof, the absence of such objective criteria was a "factor to be considered" Vaughn v. Westinghouse Elec. Corp., supra, 471 F. Supp. 285.

It follows that the decision of the Court below is fully consonant with each of the assertedly conflicting decisions cited by the petitioner. See Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (5th Cir. 1979) cert. granted; Siberhorn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978); Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978); James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979); Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978); Taylor v. Philips Industries, Inc., 593 F.2d 783 (7th Cir. 1979); Whack v. Peabody & Wind

Engineering Co., 595 F.2d 190 (3rd Cir. 1979); Coleman v. Missouri Pac. R. Co., 622 F.2d 408 (8th Cir. 1980); Middleton v. Remington Arms Co., Inc., 594 F.2d 1210 (8th Cir. 1979).

For example, there is nothing in Loeb v. Textron, Inc., supra, which contradicts the Eighth Circuit's holding that:

> The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually.

Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 659. Indeed the First Circuit in Loeb, painstakingly points out that the employer has a "burden of production" which is met by a defense designed to meet the prima facie case and which,

> must be sufficient, on its face, to 'rebut' or 'dispel' the inference of discrimination that arises from proof of the prima facie case. (emphasis added)

Loeb v. Textron, Inc., supra, 600 F.2d at 1011-1012, n.5.

> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.

Id. at 1012, n.6.

In each of the cases cited by petitioners in which the employer's burden of production is discussed[9/] the Court invariably discussed the proof or lack of proof presented by the employer to support the stated reason for its action.

Thus, to frame the question in terms of the requirement for "objective criteria" as petitioner attempts here, plainly misses the point of the decisions of this Court and the Circuits which have considered the issue. All that is required, and it is required by each of these decisions, is that there be come evidence that the asserted reason exists factually. Thus if the aserted reason for a discharge is that the employee abused the sick leave policy, Taylor v. Philips Industries, Inc., supra, the Court may properly expect to receive evidence as to whether other employees were similarly treated for similar abuses. See id. at 786. And if the employee was not allowed

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9/ Kentroti v. Frontier Airlines, Inc., supra; and Patterson v. American Tobacco Co., supra, offer no discussion of this issue.

to fill a certain vacancy, James v. Newspaper Agency Corp., supra, the Court may properly expect to receive evidence that the position was never available. See id. at 583. Similarly, if the employee was disqualified Coleman v. Missouri Pac. R. Co., supra, the Court may properly expect to receive evidence regarding the comparative qualifications of those employees not disqualified. See id. at 409.

The clear import of these decisions is that neither the Eighth Circuit's opinion in Vaughn, nor the opinions of this Court require a specific type of proof in order to rebut the prima facie case.[10/] Rather, given the particular facts of a particular case a different type of proof may be appropriate.[11/]

The Eighth Circuit carefully reviewed the record in this case and determined that this

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10/ In Furnco, for example the comparative qualifications of the employees not hired was not an issue as the defendant conceded that they were qualified.

11/ See generally, McDonnell Douglas v. Green, supra, 411 U.S at 802, n.13; Whack v. Peabody & Wind Engineering Co., supra, 595 F.2d at 193 and n.8.

Court's prescriptions with respect to the employer's burden of producing evidence once a prima facie case of employer discrimination has been established were followed by the District Court. Thus, the Eighth Circuit found that there was sufficient evidence in the record to support the District Court's view that the defendant, Westinghouse, failed to articulate a legitimate reason for Vaughn's disqualification, and, even if such a reason were found to have been articulated, the evidence, taken as a whole, was sufficient to hold the reasons to be pretextual.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG *
O. PETER SHERWOOD
CLYDE E. MURPHY
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

JOHN WALKER
1191 First National Bldg.
Little Rock, Arkansas 72201

ZIMMERY CHUTCHER, JR.
Mays, Crutcher & Brown
One Union National Plaza
Suite 836
Little Rock, Arkansas 72201

ATTORNEYS FOR RESPONDENTS

*Counsel of Record

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IN THE

# Supreme Court Of The United States

No. 80-276
October Term, 1980

Westinghouse Electric Corporation,
*Petitioner,*

v.

Christine Vaughn and Marion Gee,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY BRIEF

JAMES W. MOORE*
2000 First National Building
Little Rock, Arkansas 72201
(501) 376-2011

WALTER A. PAULSON

*Attorneys for Petitioner*

*Counsel of Record

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## REPLY BRIEF

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## ARGUMENT

### REPLY TO ADDITIONAL ARGUMENTS RAISED IN BRIEF IN OPPOSITION

I. WAS THE CHARACTER OF THE OPPOSING EVIDENCE PRESENTED BY THE RESPONDENT TO ESTABLISH A PRIMA FACIE CASE SUFFICIENT ALSO TO OVERCOME DEFENDANT'S ARTICULATED NON-DISCRIMINATORY REASON FOR

THE CONDUCT, ABSENT THE REQUIREMENT OF AN UNFAIR STANDARD OF PROOF?

In her brief in opposition, the respondent asserts that Westinghouse failed to demonstrate the legitimacy of its argiculated reason for her job disqualification in 1971 by a preponderance of the evidence. It is respondent's contention that her opposing evidence was sufficiently strong to overcome entirely the proof offered by the petitioner as to the reason for her job disqualification. In order to establish a prima facie case, the respondent relied upon statistics that showed that discharges were in higher percentages than the overall proportion of blacks in defendant's work force, and that hiring resulted in a black employee representation that although in excess of their representation in the surrounding labor force, was lower than the percentage of blacks who had applied for employment during a given period. From those statistics, the trial court drew an inference that, even though no statistics were presented as to job disqualifications, a prima facie case could be inferred as to disqualifications as well. The court then held that the employer's evidence, consisting of both written and testimonial evidence of warnings to the employee, and testimony by her supervisor indicating that her error rate was consistently higher than that of other employees, was not sufficient to rebut the plaintiff's assertions to the contrary.

Respondent makes much of the statistical evidence presented in the trial court. Courts have distinguished between the value of statistics in individual—as opposed to class—complaints. *Times v. Board of Ed. of McNeil, Arkansas*, 452 F.2d 551 (8th Cir. 1971). *Bolton v. Murray Envelope Corp.*, 493 F.2d 191 (5th Cir. 1974); *Narraine v. Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974). The

application of statistics becomes even more difficult in discipline or discharge cases, where the act or conduct complained of is individualized and personal. In this case the District Court accepted statistical data not only to establish a prima facie case, but also applied to same evidence to determine that the reasons articulated by the petitioner on job disqualification were pretextual. If such a test were to prevail, then Title VII plaintiffs would succeed in disparate treatment cases based upon statistics alone. This result overlooks the important distinction between disportionate impact and disparate treatment cases defined by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). In that case, the Court held that "statistics as to petitioner's employment policy and practice may be helpful . . . " but cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." *Id.* In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), at 340, this Court stated that "[s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted." An employer required to meet the burden imposed by the trial court in the instant case could never terminate or discipline a substandard minority employee, as long as the statistics concerning his overall work force were not on par with the minority representation in the surrounding community or his applicant flow data deviated from hiring data.

Had the trial court allocated the burdens properly between the parties, the disqualification issue would have been resolved as follows:

(1) Is poor production a "legitimate, non-discriminatory reason" for a disqualification (not a

discharge) from a particular position? Obviously it is, for production is clearly a business-related and necessary element of job performance in private industry. In *McDonnell Douglas, supra*, at 802-03, this Court held that the articulation burden was met by asserting a "reasonable basis for refusal to hire."

(2) If the reason offered by the employer is "legitimate" has the employer in this case "shown", "proved", or "articulated" such a reason? As the district court and the court of appeals both found, "Vaughn 'unquestionably had problems with production . . . .'" (Appendix B to Petition for Certiorari, p. 15 [hereinafter "Pet. App."]. Thus, Westinghouse must have adduced some convincing evidence of poor production. In fact, that evidence was enough to move the reviewing court to admit that "[i]n viewing the evidence we might be of the opinion that Westinghouse articulated a legitimate reason for Vaughn's disqualification . . . ." (Pet. App. B-16, 17.) In *McDonnell Douglas*, the Court found that the petitioner had "assigned respondent's participation in unlawful conduct against it as the cause for his rejection." *Id.* at 803. That, said the Court, "suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination. *Id.*

(3) If the reason is "articulated" by the employer and found to be "legitimate" (that is, if the reason exists in fact, and is sufficient to support a disciplinary action) has the plaintiff overcome those proffered reasons by showing them to be pretextual? The court of appeals held, "Vaughn was not required to show that the reasons were pretextual." (Pet. App. B-17.)

Petitioner submits that in a proper allocation of burdens, the plaintiff will allege through statistics and other

evidence that discrimination exists. Defendant will then rebut with more specific reasons as to the particular incident alleged to be discriminatory. The plaintiff will then show if he can that those reasons are pretextual. He may do this by showing that whites are treated differently than blacks in the same or similar circumstances (*McDonnell Douglas, supra*, at 804) or by relying on more specific statistics which show that when the employer was faced with the same employment decision in the past, blacks were disparately treated and therefore the "reasons" in the instant case which are non-discriminatory on their face are, when viewed in this light, merely pretext. No showings of this nature have been made by the respondent in the instant case.

II. DOES THE PETITIONER'S ASSERTION THAT THE DISTRICT AND CIRCUIT COURTS BASED THEIR DECISIONS UPON AN IMPROPER BURDEN OF PROOF BY REQUIRING OBJECTIVE CRITERIA AND A PREPONDERANCE OF EVIDENCE, "DISTORT THE RECORD AND MISCONSTRUE THE HOLDINGS OF THE COURT BELOW?"

The answer to this question is a simple "no." A review of the language of both courts will support that answer. Contrary to respondent's assertions, the petitioner does not rely merely on isolated language taken out of context to the main thrust of the decision. Rather, the holdings of both courts suggest that the lack of rebuttal evidence in the form of objective production criteria was central to the decisions. For example, respondent places heavy reliance on the strong opposing evidence, yet, except for the testimony of Ms. Vaughn, there was no other evidence that went specifically to the issue of disqualification. The issue before this Court is

not whether the trial court resolved that basic credibility determination improperly against the petitioner. The issue is rather whether, lying beneath that resolution, and establishing a clear pattern throughout both opinions in the lower courts, there were improper requirements placed on petitioner to either (1) disprove any discriminatory motive or (2) prove legitimate reasons by a preponderance of the evidence, using objective criteria.

In the original Order by the district court, it was held that "[t]he Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons." (Pet. App. A-28.) If that test was applied, as petitioner believes it was, then the unfairness to petitioner of improperly imposing such a burden was hardly cured by the court's subsequent Order suggesting that the test was actually one of "simply fail[ing] to articulate a legitimate non-discriminatory reason for Ms. Vaughn's disqualification." (Pet. App. A-41) The "definite and firm conviction" still remains that the court relied on an improper standard during the trial. There was evidence, apparently credible to the trial court, that Ms. Vaughn had difficulty with absenteeism, "but not so great as to warrant dismissal." (Pet. App. A-29.) There was also evidence that she had experienced poor production. It should be pointed out that Ms. Vaughn was never terminated but only disqualified from holding one type of job in petitioner's plant in 1971. In fact, the district court pointed out that "[t]he prima facie case made here does not relate specifically to disqualifications of employees . . . ." (Pet. App. A-28.) Nevertheless, the court remained unconvinced because "the *absence of objective production criteria* makes it difficult for the court to hold that these problems were serious enough to meet the burden imposed on the defendant by

law." (Pet. App. A-29, 30.) The petitioner would assert that the court must have been referring to the burden imposed only sentences before, and previously quoted *supra*. (Pet. App. A-28.) The burden allocated to the parties becomes extremely important when considered in light of the almost total lack of opposing evidence concerning production, either by Ms. Vaughn or by other white employees. If "articulation" is the standard, a defendant need not assume the burden of producing evidence that the plaintiff's error rate was no greater than other white employees who were not disqualified, because the plaintiff has not met its burden of producing evidence on that issue.

Nor was the attempt by the trial court to impose its own standard of "objective" employee evaluation a mere isolated reference. The court continues its discussion of such objective factors by stating that "[a]pparently defendant's supervisors had numerical standards to judge performance, but these standards were not communicated to the employees and were not revealed to the court in testimony." (Pet. App. A-30.) Again, in its suggestions for submission to the court on the relief issues, the trial court asked whether the company should "be required to institute objective performance criteria by which [Ms. Vaughn's] fitness to retain the job can be assessed?" (Pet. App. A-31.) In the Supplemental Findings of Fact and Conclusions of Law (Pet. App. A-33 [11].), the trial court suggested that the defendant "could perhaps avoid some legal difficulties in the future if it adopted such criteria for evaluation of employeees," (referring to its own "objective" standards) but resolves the difficulty of developing such criteria by saying that the court should not involve itself in management decisions of this nature. (*Id.*) Finally, the court states that it is "not persuaded that the imposition of such a

requirement is necessary to vindicate the statute." (*Id.*) If such objective criteria are not necessary to remedy violations of the statute, how can they become the basis for an employer's liability under Title VII?

The court of appeals was no less dependent upon objective criteria in its resolution of the issues upon review. First imposing the burden of rebuttal by a preponderance of the evidence rather than merely adducing evidence, the court discusses how the employer might meet such a rebuttal burden. The court reviewed the conflicting testimony between the supervisor and the employee, and then stated that, even considering that testimony, "the company had not articulated objective standards indicating what satisfactory production levels were." (Pet. App. B-15.) The court even quoted the district court's language, quoted *supra*, on the absence of objective production criteria. (Pet. App. B-15, 16, quoting Dist. Ct., Pet. App. A-29.). The court of appeals next held, as set out separately by respondent (Brief in Opposition at 9 [hereinafter "Brief Opp."]) that "given the opposing evidence concerning production *and the absence of objective production criteria*, Westinghouse failed to demonstrate the legitimacy of its articulated reason by a preponderance." (Pet. App. B-16.) (Emphasis added.) Petitioner asserts that the court used the term *and*, not *or*, and therefore considered the lack of objective criteria as an essential, if not the primary basis for upholding the trial court. If viewed as it must be by a defendant seeking to rebut a prima facie case of discrimination, this language by the court of appeals can mean only that, while the defendant need not prove its reason for the challenged conduct is non-discriminatory (as this would be violative of *Sweeney*), he must prove that the reason articulated is legitimate, and must do so by a preponderance of the evidence, even though the plaintiff has not yet presented any evidence of its illegitimacy. The result is obvious—the defendant is still required to rebut the pretext before it is presented. He must still

prove that his reasons were non-discriminatory in order to succeed.

Petitioner is at a loss to understand how the respondent can assert that *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978) or *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978) stand for the proposition that the defendant must rebut the prima facie case by a "preponderance." The dissent in *Sweeney* indicates that "adducing evidence that explains what he had done" satisfies the defendant's burden. Any evidence therefore, is enough to meet the requirement of adducing evidence. "Adducing" certainly does not require proof by a preponderance. Respondent misleads this Court by asserting that the trial court rejected certain "incredible" evidence. The district court merely weighed apparently credible (*c.f.* Pet. App. A-29.) evidence on both sides and held that the quantum of evidence was not enough to meet the preponderance burden. No such burden exists, and no decision of this Court has ever suggested that it did.

Respondent's reliance on *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) is illustrative of the misunderstanding of burdens of proof inherent in respondent's argument. The quoted language in *Loeb* that the evidence must be sufficient to rebut or dispel the inference does not address the measure of proof required to accomplish that rebuttal. That measure is set by *McDonnell Douglas*, *Furnco*, and *Sweeney*. In fact, the *Loeb* court went on to say that "the more idiosyncratic or questionable the employer's reason, *the easier it will be to expose it as a pretext*." 600 F.2d at 1012n.5. (Emphasis added.) The court obviously believed that the defendant's burden was to produce a reason, and the plaintiff's burden, in order to prove that reason to be pretextual, would be eased—not *erased*—if defendant's proffered reason was not a legitimate one. Thus, if as respondent points out (Brief Opp. p. 20) "the asserted reason for a discharge is that

the employee abused the sick leave policy . . . , the court may properly expect to receive evidence as to whether other employees were similarly treated for similar abuses." But in that statement lies the misunderstanding by the respondent. The burden of producing such evidence lies with the plaintiff, not the defendant. A contrary result is precisely what this Court sought to avoid in *Sweeney.*

## *CONCLUSION*

Whether or not the district court's decision was an erroneous factual resolution after all the facts are considered can only be determined after a retrial in which the plaintiff is required to present evidence going to the issue of pretext, under the correct legal standard that the defendant, by articulating a legitimate non-discriminatory reason, without being required to prove its reason by objective criteria, has successfully rebutted the prima facie case. Then, if the defendant is unable to rebut the additional pretextual evidence, the plaintiff will ultimately prevail. To date, no pretextual evidence has been presented, because the district court's erroneous resolution of the legal issues effectively circumvented that step. In so doing, the decision of the trial court, and the subsequent decision of the circuit court, were clearly erroneous, and require reversal.

Respectfully submitted,

JAMES W. MOORE
2000 First National Building
Little Rock, Arkansas 72201
(501) 376-2011

WALTER A. PAULSON II

*Attorneys for Petitioner*